BLANK
PAGE

Office-Supreme Court, U.S.
FILED
JUN 18 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. ~~1272~~ 115

NATHANIEL BUCHANAN, *etc., et al.*,
Plaintiffs-Appellants,

v.

THE HONORABLE JAMES A. RHODES, *etc., et al.*,
Defendants-Appellees.

MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANTS-APPELLEES TO DISMISS OR AFFIRM.

RICHARD M. MARKUS,
1400 Leader Bldg.,
Cleveland, Ohio 44114,
Counsel for Appellants.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

BLANK
PAGE

TABLE OF CONTENTS.

The Motion to Dismiss ---------- 1

The Motion to Affirm ---------- 5

Conclusion ---------- 9

TABLE OF AUTHORITIES.

Cases.

Bailey v. Patterson, 369 U. S. 31 (1962) ---------- 5

Coulter v. General Fire Proofing Co., 67 Ohio App. 71, 35 N. E. 2d 1003 (1941) ---------- 6

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U. S. 71 (1962) ---------- 4

Lucas v. General Assembly of Colorado, 377 U. S. 713 (1964) ---------- 9

Reed Enterprises v. Corcoran, 354 F. 2d 519 (D. C. Cir. 1965) ---------- 4

State Automobile Ins. Co. v. Kaffenberger, 84 Ohio App. 304, 83 N. E. 2nd 916 (1948) ---------- 6

Stratton v. St. Louis Southwestern R. R., 282 U. S. 10 (1930) ----------1, 3, 4

Szejkovski v. Tamm, 326 F. 2d 657 (D. C. Cir. 1963) 4

Zemel v. Rusk, 381 U. S. 1 (1935) ---------- 6

Constitution.

Constitution of the United States:

Article III, Section 1 ---------- 8

Fourteenth Amendment ---------- 8

Statutes.

Judicial Code, Section 266 (act of March 3, 1911, Chapter 231, Section 266, as amended by 37 Stat. 1013 (1913), and 43 Stat. 938 (1925)), 28 U. S. C. (1940 ed.), Section 380 2

Ohio Rev. Code, Section 1343.03 6

28 U. S. C., Section 1253 ..... 3, 5

In the Supreme Court of the United States

OCTOBER TERM, 1965.
No. 1272.

NATHANIEL BUCHANAN, *etc., et al.,*
Plaintiffs-Appellants,

v.

THE HONORABLE JAMES A. RHODES, *etc., et al.,*
Defendants-Appellees.

MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANTS-APPELLEES TO DISMISS OR AFFIRM.

THE MOTION TO DISMISS.

As we pointed out in our Jurisdictional Statement, the review sought by this appeal is supplemented by a request for leave to file a mandamus petition. Both procedures seek the same relief, *viz,* a directive that a three-judge court be convened. Citing *Stratton v. St. Louis Southwestern R. R.,* 282 U. S. 10 (1930), appellees insist that the appropriate remedy is the mandamus action rather than an appeal. Since both procedures are now pending before this Court, it might seem academic to inquire which is the appropriate remedy.

However, we respectively submit that the appropriate remedy in this case is the appeal presented here. We make that statement despite the following language in the *Stratton* decision (282 U. S. 10, at 15-16):

> "Fourth, if a single judge, thus acting without jurisdiction, undertakes to enter an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this court,

> as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirements. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single Judge and an appeal to the Circuit Court of Appeals for the decree by three judges and a direct appeal to this court.
>
> "Accordingly, where a court of three judges should have been convened, and was not, this court may issue a Writ of Mandamus to vacate the order or decree entered by the District Judge and directing him or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for an interlocutory injunction."

While this language would seem to be clear and dispositive, we submit that it is no longer applicable to a direct appeal in these circumstances. The decision in the *Stratton* case construes the language of the old Judicial Code, Section 266 (act of March 3, 1911, Chapter 231, Section 266, as amended by 37 Stat. 1013 (1913), and 43 Stat. 938 (1925)). That section appears at 28 U. S. C. (1940 ed.), Section 380. Unlike the replacement section in the present code, that former code provision describes in a single section, (a) the requirements for a three-judge court in an action to enjoin enforcement of a state statute on federal constitutional grounds, (b) the procedure for the creation of such a court, (c) the special rules applicable to the determinations of such a court, and (d) the available appeal from such a court. The language relating to direct review by this Court is extracted from this lengthy code section as follows:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction *in such case* * * *. The requirement respecting the presence of three judges shall also apply to the final hearing of such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction *in such suit*" (emphasis added).

This language was open to the construction that a direct appeal was available only in cases which were in fact heard by a three-judge court. That interpretation would exclude a direct appeal in cases where a three-judge court was required by law but was in fact not convened. The *Stratton* case interpreted that language in that manner.

However, a significant change in language was made by the 1948 revision of the Judicial Code. The sections requiring a three-judge district court for different purposes were reorganized and revised with an apparent purpose of making them more uniform in application. A new section was created to deal with the right of direct review to this Court in all three-judge district court situations. Thus, 28 U. S. C., Section 1253 now provides:

> "* * * any party may appeal to the Supreme Court from an order granting or denying * * * an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges*" (emphasis added).

We submit that the language of the present code is not open to the same construction which this Court gave to the predecessor section in the *Stratton* case. A direct appeal is now appropriate where any act of Congress *required* the convening of a three-judge court, whether or not such a court was in fact convened.

We submit further, that this change in procedure is salutary for judicial administration. The rule in the *Stratton* case seemingly precluded the federal courts of appeal from any review. It permitted review of a district judge's refusal to convene a three-judge court only by the somewhat cumbersome procedure of an extraordinary mandamus writ in this Court. Some attempt was made to alleviate this situation by this Court's decision in *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U. S. 71 (1962). In that decision, this Court noted that the court of appeals had found that a three-judge court should have been assembled, but considered itself powerless to order any remedy in light of the *Stratton* decision. This Court said at 370 U. S. 716:

> "Stratton does not stand for the broad proposition that a Court of Appeals is powerless ever to give any guidance when a single judge has erroneously invaded the province of three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled."

Attempting to apply that rule, the federal courts of appeals find themselves in a position of rendering advisory opinions with an expressed hope that the district court would remedy its errors—but without any power to order a correction. E.g. *Szejkovski v. Tamm,* 326 F. 2d 657 (D. C. Cir. 1963); *Reed Enterprises v. Corcoran,* 354 F. 2d 519 (D. C. Cir. 1965). The use of such advisory opinions without binding effect is certainly not the best method for judicial review.

For the above reasons, we submit that the threshold determination of whether a three-judge district court was

required should be made by this Court under the present language of 28 U. S. C., Section 1253. If the convening of a three-judge district court was *not required*, there is no right of appeal to this Court; if a three-judge court *was required*, review is expressly provided by the present statutory language. We have been unable to find any decision by this Court since the 1948 codification which construes the new language in these circumstances. The only language which would seem to relate to the right of review by this Court of the determination whether a three-judge court was required, is that which appears in *Bailey v. Patterson*, 369 U. S. 31 (1962). In the *Bailey* case, this Court determined that the case was not one which required a three-judge court and was, therefore, not one in which a direct appeal was proper. The court added at 369 U. S. 34:

> "However, we have jurisdiction *to determine the authority of the court below* or to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes" (emphasis added).

For the above reasons, we urge that this Court utilize the appeal remedy rather than the extraordinary mandamus remedy, which is likewise being invoked as an alternative protection for the rights of these appellants.

THE MOTION TO AFFIRM.

The second branch of the motion by Defendants-Appellees seeks to deny that there was any requirement for a three-judge court in this case. They assert, in substance, that there is no real constitutional issue presented by the Amended Complaint. The single-judge district court apparently assumed that the standard for determining whether to convene a three-judge court was the same as

the standard used to decide the case on its merits. By contrast, this Court said in *Zemel v. Rusk,* 381 U. S. 1, at 6 (1935):

> "Although we do not accept Appellant's argument, infra pp. 17-18, we cannot agree that it is so insubstantial as to compel a District Court to read it out of the complaint and to refuse to convene a three-judge court."

We submit that the constitutional controversy presented by the complaint here is far too grave "to compel a District Court to read it out of the complaint and to refuse to convene a three-judge court."

Appellees' arguments deal principally with the equal protection considerations raised in our Jurisdictional Statement, and largely ignore or by-pass the important due process elements discussed at greater length in the Jurisdictional Statement. With respect to the due process violations described, appellees argue that there is no real showing of a loss of property rights. That contention is based on the theories that (a) judgments in civil damage actions are supplemented by interest at six percent (6%) from the date of the damage suffered, (b) discovery depositions are available to preserve evidence, and (c) a motion to advance a case out of order is available in the Common Pleas Court to avoid special prejudice. We have some difficulty in responding to the first of these three theories since *its premise is undisputably, unmistakeably, and unequivocally wrong.* The law of Ohio is absolutely clear that interest on an unliquidated damage claim runs only from the time of the judgment. Ohio Rev. Code, Section 1343.03; *State Automobile Ins. Co. v. Kaffenberger,* 84 Ohio App. 304, 83 N. E. 2nd 916 (1948); *Coulter v. General Fire Proofing Co.,* 67 Ohio App. 71, 35 N. E. 2d 1003 (1941).

Since the aggrieved party receives no compensation whatever for his delay in obtaining damages, the loss of interest during the four year docket delay, is another form of property loss caused by the denial of due process in failing to afford a timely hearing.

Second, despite appellee's reliance upon the discovery procedures available in Ohio, one can hardly hope to substitute these methods to preserve evidence for a trial itself. At best, the use of interrogatories and depositions can preserve a small segment of the evidence which will be presented in a full trial. If other witnesses who are not deposed become unavailable with the passage of time, the property rights involved in the action or defense of the claim have been forever lost. Indeed, even those witnesses whose testimony has been the subject of a deposition, have a tendency to recall circumstances differently as time progresses, so that a prolonged passage of time is a further impairment of those property rights.

Finally, the availability of a motion to advance a case out of order is essentially no comfort to the overwhelming multitude of litigants, and should be no comfort to appellees in denying the very real loss of property rights. A motion to advance is granted only in extraordinary circumstances, usually where one of the litigants is unlikely to survive the docket delay by reason of his age or physical infirmities. As counsel for appellees must fully appreciate, such motions are granted only on rare occasions. If the situation were otherwise, complete chaos would result in the trial court when preferences were extended to specific litigants without extraordinary justification. Further, whenever one case is advanced for hearing, another is necessarily delayed by the time of the hearing in that first case. Obviously, a trial court could not grant every liti-

gant's request to advance his case in front of every other litigant. Therefore, the rare occasion on which a motion to advance is allowed has no effect whatever on the average docket delay for the average litigant.

The bulk of defendants' motion to affirm deals with equal protection considerations. They argue that there is no clear judicially available standard to provide more nearly equal protection, since factors other than the number of judges will affect the length of the docket delay. At the same time, defendants are presenting the somewhat anomalous argument that metropolitan areas (which have fewer judges per capita) have greater need for more judges per capita because of higher urban crime rates and commercial litigation. This would seem to be an ample demonstration that the allocation of judgeships in Ohio is indeed an invidious discrimination without reasonable or justifiable support since the areas which have a lower per capita allotment of judgeships have need for a greater per capita allotment of judgeships than the others. The remedy sought by this action is not unlike that provided by the Constitution of Florida and other states which guarantee each county a judge for a stipulated number of citizens. (In the case of Florida, one judge for each 50,000 persons or any major fraction thereof.)

Next, appellees seek to draw a parallel between the allocation of judgeships within Ohio and the allocation of judgeships in the federal system. We submit that this parallel has no greater constitutional meaning here than when it was attempted in the legislative reapportionment cases. The Federal Constitution expressly delegates the creation, form, and location of the Federal Courts inferior to this Court, to the Federal Congress. *U. S. Constitution*, Article III, Sec. 1. The states are obliged to comply with the requirements of the Fourteenth Amendment which

guarantees equal protection and due process to all citizens, without any delegation of authority to allocate courts.

We note that appellees make no comment whatever about the denial of due process and/or equal protection which results from a systematic reassignment to the Cleveland area court of judges who are elected by citizens from other parts of the State. They make no comment about the direct conflict between the decision below and that of the District Court for the Eastern District of New York, which has convened a three-judge district court on litigation involving this very subject. They do not question the fact that there is a great disproportion in the allocation of judgeships among the Ohio counties from a population viewpoint. They do not deny that additional judgeships is at least one method of alleviating unconscionable docket delays. Instead, appellees repeat the refrain that appellants should seek their redress in the Ohio Legislature. We would ask the Court to remember that the Ohio Legislature has repeatedly rejected proposed legislation to give any real relief to the urban judicial docket, and that the conceivable availability of legislative relief has no constitutional significance beyond the formulation of an appropriate remedy after appellants' rights are declared by the courts. See *Lucas v. General Assembly of Colorado*, 377 U. S. 713 at 736-37 (1964).

CONCLUSION.

We respectfully submit that the motions by defendants-appellees to dismiss or affirm should be denied. We again ask this Court to accept jurisdiction of this matter to establish plaintiffs' right to a hearing on the merits before a three-judge district court. Legislatures in metropolitan states have generally failed in their obligation to

provide a judicial remedy. If the courts fail to insist upon the availability of such a remedy, public confidence cannot be long maintained.

Respectfully submitted,

RICHARD M. MARKUS,
1400 Leader Building,
Cleveland, Ohio 44114,
Counsel for Plaintiffs-Appellants.

END